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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA

8 HILLSIDE DAIRY, INC., et al.) CIV-S-97-1179 GEB JFM
9)
10 Plaintiffs,) ORDER
11)
12 v.)
13)
14 A.G. KAWAMURA, Secretary,)
15 California Department of Food &)
16 Agriculture, et al.,)
17 Defendants.)
18)
19 PONDEROSA DAIRY, et al.) CIV-S-97-1185 GEB JFM
20)
21 Plaintiffs,)
22)
23 v.)
24)
25 A.G. KAWAMURA, Secretary,)
26 California Department of Food &)
27 Agriculture, et al.,)
28 Defendants.)

21 Plaintiffs in both actions move for summary judgment on
22 their facial challenge to California Food & Agricultural Code §§ 62077
23 and 62078, and certain 1997 amendments to the California Department of
24 Food and Agriculture Pooling Plan for Market Milk ("Pooling Plan"),
25 arguing these statutes and the amendments are unconstitutional under
26 the Commerce Clause. Defendants oppose the motion, except for the
27 portion that seeks to enjoin Defendants from enforcing
28 §§ 62077 and 62078 on interstate raw milk sales.

CHALLENGE TO 62077 AND 62078

Defendants state the Department of Food and Agriculture has not applied §§ 62077 and 62078 to out-of-state raw milk producers, "does not intend to do so in the future, and . . . does not object to a permanent injunction prohibiting the Department from enforcing these provisions on out-of-state dairy farmers. . . ." (Defs.' Supp. Brief in Opp'n to Pls.' Joint Mot. for Summ. J., filed April 5, 2004, at 2.) In light of Defendants' position, it must be determined whether Plaintiffs need an injunction preventing Defendants from doing what they say they have not done and will not do; specifically, Defendants state they have not applied and will not apply §§ 62077 and 62078 to interstate raw milk sales. Before a permanent injunction issues, Plaintiffs have to demonstrate a likelihood of substantial and immediate irreparable injury. See Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996) ("The requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'").

Plaintiffs contend even though Defendants state they do not intend to enforce §§ 62077 and 62078 on interstate raw milk sales, Defendants lack authority under Article III, section 3.5(a) of the California Constitution to "refuse to enforce a statute . . . unless an appellate court has made a determination that such statute is unconstitutional. . . ." (Pls.' Supp. Memo. of P. & A. at 19.) Therefore, Plaintiffs contend an injunction is required because the Department of Food and Agriculture "may [eventually] attempt to enforce" these statutes on interstate raw milk purchases. (Id.) But speculation that Defendants may eventually alter their position on

1 enforcement of these statutes is insufficient to justify injunctive
2 relief. Since Defendants have agreed not to enforce these statutes on
3 interstate raw milk sales, it is inappropriate to "pass upon the
4 constitutionality of [the statutes because the] suit . . . is not
5 adversary, [and] there is no actual antagonistic assertion of rights."
6 Congress of Indus. Orgs. v. McAdory, 325 U.S. 472, 475 (1945) (holding
7 that no decision should be reached on the constitutionality of a
8 statute, since the government agreed not to enforce it). Therefore,
9 Plaintiffs' challenge to these statutes is dismissed. See generally
10 Enrico's, Inc. v. Rice, 730 F.2d 1250, 1253-55 (9th Cir. 1984)
11 (dismissing appeal after government ceased enforcing challenged
12 regulations, since Article III jurisdiction ceased to exist).

13 CHALLENGE TO 1997 POOLING PLAN AMENDMENT

14 Plaintiffs also seek to prevent Defendants' application of a
15 1997 amendment to the Pooling Plan, contending that it discriminates
16 against some interstate raw milk purchases. The challenged 1997
17 amendment amends § 900 of Article 9 of the Pooling Plan to require
18 certain California processors who buy raw milk from out-of-state
19 producers to make a payment to an equalization pool ("the pool") from
20 which disbursements are made to various California raw milk producers
21 and processors. This payment is calculated as follows: First, the
22 raw milk purchased is assigned a class price corresponding to the use
23 made of that raw milk under § 900(a).¹ Then, the lower of the "value

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25 ¹ California law establishes five classes of dairy products
26 which California processors create from raw milk. See Food &
27 Agric. Code §§ 61932-61935. The Pooling Plan "establishes minimum
28 prices to be paid by handlers to producers for market milk in the
various classes." Id. § 62062. But "[t]he price that a
[California processor] pays for raw milk based upon its [class]
does not necessarily equal the price that a [California producer]
receives for the raw milk" under the Pooling Plan. (Pls.' Undis.

1 based on the receiving plant's inplant usage" or a modified quota
2 price is deducted from the class price assigned under § 900(a).² The
3 remainder must be paid into the pool under § 1003.

4 Defendants explain the effect of this amendment as follows:

5 Under the Pooling Plan, as amended, California
6 processors account to the pool for their purchases
7 of out-of-state milk based on the utilization of
8 that milk. The quota and overbase pool prices
9 [which are paid to California raw milk producers]
10 are generated from that pool of revenue, whereas
prior to the Amendments, the quota and overbase
prices were calculated after the out-of-state milk
had, in effect, been subtracted out of the pool.
The effect of this change is that quota and
overbase prices have increased.

11 (Defs.' Supp. Undis. Facts ¶ 6.) Plaintiffs contend this payment,
12 which is made because of interstate raw milk sales and only disbursed
13 to certain California dairy businesses for their benefit, is an
14 unconstitutional tariff.

15 The issue is whether the facial requirement in the Pooling
16 Plan prescribing that this payment be made constitutes a monetary
17 assessment on interstate raw milk sales for the economic protection of
18 California dairy businesses, which discriminates against interstate
19 raw milk sales. "[U]se [of] the term . . . 'discrimination' simply
20 means differential treatment of in-state and out-of-state economic
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22 Facts ¶ 13.) "Thus, for example, processors of fluid milk pay a
23 premium price, part of which goes into an equalization pool that
24 provides a partial subsidy for cheese manufacturers who pay a net
25 price that is lower than the farmers receive." Hillside Dairy,
Inc. v. Lyons, ___ U.S. ___, 123 S. Ct. 2142, 2145 (2003) (citation
omitted).

26 ² The quota price, established by Defendants, is
27 "compute[d] based on the weighted average classified prices of all
28 raw milk purchases in the State." (Pls.' Undis. Facts ¶ 15.) The
quota price is used to determine the price certain California raw
milk producers receive when they sell raw milk to a California
processor.

1 interests that benefits the former and burdens the latter. If a
2 restriction on commerce is discriminatory, it is virtually *per se*
3 invalid." Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality of the
4 State of Oregon, 511 U.S. 93, 99 (1994).

5 Under the Pooling Plan, when a California dairy products
6 processor purchases raw milk from a California producer, the processor
7 pays into the pool an "establishe[d] minimum price" set by Defendants.
8 Cal. Food & Agric. Code § 62062. Plaintiff's competitor, a California
9 raw milk producer, receives a guaranteed minimum raw milk price
10 because of the Pooling Plan, irrespective of the dairy product to
11 which the raw milk is converted, (Pls.' Undis. Facts ¶ 14), payment of
12 its shipping costs, (Defs.' Opp'n to Pls.' Undis. Facts ¶ 7), and the
13 right to vote on the manner in which the Pooling Plan operates.

14 (Pls.' Undis. Facts ¶ 20.) When a California dairy products processor
15 purchases raw milk from an out-of-state producer, § 900 requires the
16 processor to pay the amount set by Defendants under § 900, regardless
17 of the raw milk purchase price negotiated between the processor and
18 producer. Although California processors, rather than out-of-state
19 raw milk producers, make this payment, that is immaterial to the
20 Commerce Clause analysis. West Lynn Creamery, Inc. v. Healy, 512 U.S.
21 186, 203 (1994) ("The idea that a discriminatory tax does not
22 interfere with interstate commerce merely because the burden of the
23 tax was borne by consumers in the taxing State [rather than out-of-
24 state sellers has been] thoroughly repudiated. . . .") (citation and
25 quotation marks omitted). The payments by California processors for
26 interstate raw milk purchases are pooled, and each California raw milk
27 producer is paid "a weighted average 'pool price'" for all raw milk
28 sold to California processors. (Defs.' Memo. of P. & A. at 10.) The

1 face of the Pooling Plan reveals that out-of-state raw milk producers
2 selling milk to California processors receive no benefit from the
3 pool.

4 Plaintiffs contend the Pooling Plan is similar to the milk
5 system considered in West Lynn, 512 U.S. at 190-91, which was declared
6 unconstitutional under the Commerce Clause. That system "require[d]
7 every [milk] 'dealer' in Massachusetts to make a monthly 'premium
8 payment' into the 'Massachusetts Dairy Equalization Fund'
9 . . . [based on] the amount . . . of the dealer's [fluid milk] sales
10 in Massachusetts [regardless of the state where that milk was
11 produced]. Each month the fund [was] distributed to Massachusetts
12 [raw milk] producers." Id. The Supreme Court stated this payment was
13 "effectively a tax which makes milk produced out of State more
14 expensive." Id. at 194. The Court explained: "Massachusetts not only
15 rebates to domestic milk producers the tax paid on the sale of
16 Massachusetts milk, but also the tax paid on the sale of milk produced
17 elsewhere." Id. at 197.

18 Defendants argue West Lynn is distinguishable, contending
19 the Pooling Plan does not "require the out-of-state producer to accept
20 [a] minimum price, [because] he can negotiate against [the minimum
21 price applied to in-state raw milk sales], he can compete against his
22 California counterparts but he isn't competing based on the minimum
23 price for butter [sic], he's competing based on the higher minimum
24 floor price that the department has given him. . . ." (April 19,
25 2004, hearing transcript at 9.) But this argument is unpersuasive
26 because as stated in West Lynn: "out-of-staters' ability to remain
27 competitive by lowering their prices would not immunize a
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1 discriminatory measure" from being invalidated under the Commerce
2 Clause. Id. at 195.

3 Since the 1997 amendment to § 900 requires out-of-state raw
4 milk producers to pay for benefits received exclusively by California
5 dairy businesses, it is similar to the milk pricing order invalidated
6 in West Lynn. Like the charge in West Lynn, this charge attendant to
7 interstate milk sales, which is evident on the face of the Pooling
8 Plan and just benefits certain California dairy businesses, renders
9 § 900 discriminatory "because it, like a tariff, neutralizes
10 advantages belonging to the place of origin." West Lynn, 512 U.S. at
11 196 (citation and quotation marks omitted).

12 Defendants argue notwithstanding this discriminatory effect,
13 § 900 should not be invalidated because it "advances a legitimate
14 local purpose that cannot be adequately served by reasonable
15 nondiscriminatory alternatives." Oregon Waste, 511 U.S. at 101. The
16 Commerce Clause requires that any justification advanced for a
17 discriminatory restriction on commerce "pass the strictest scrutiny."
18 Id. (citation and quotation marks omitted).

19 Defendants assert the need to prevent "roundtripping" is a
20 justification for § 900. "Roundtripping" refers to truckloads of raw
21 milk exiting California and then turning around and re-entering
22 California so that the raw milk could be reported as out-of-state milk
23 when it is sold to a California processor.³ (Lombardo Decl. ¶ 6.)

24 At the hearing, Defendants' counsel was asked whether this
25 practice could be halted by simply requiring California processors to
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28 ³ It is assumed without deciding that preventing
roundtripping is a legitimate local purpose.

1 swear under penalty of perjury whether the raw milk they purchased was
2 produced in California. Defendants' counsel responded:

3 Your Honor, that was what the department tried
4 initially. And what happens is that a particular
5 dairy, a particular co-op in California entered
6 into an agreement with an out-of-state co-op
7 whereby they sold their milk to the out-of-state
8 co-op and the out-of-state co-op in turn sold
9 approximately the same amount of milk into the
10 state and gave the in-state dairy a kickback,
11 which was the benefit of roundtripping. If the
12 processor purchasing that milk had stated under
13 penalty of perjury who it purchased that milk
14 from, it would not be identified as round-
15 tripping, it would be identified as a legitimate
16 purpose, coming from out-of-state.

17 (April 19, 2004, hearing transcript at 54.) This argument is
18 unpersuasive. Defendants have only addressed the effectiveness of
19 requiring a California processor to identify the seller of the raw
20 milk. Defendants have not shown that requiring California processors
21 to state whether the raw milk they purchase was produced in California
22 would be ineffective in preventing raw milk produced in California
23 from being reported as produced elsewhere. Defendants have failed to
24 carry their burden of showing the absence of reasonable,
25 nondiscriminatory alternatives to § 900.

26 Since § 900 discriminates on its face against interstate raw
27 milk sales and Defendants have not carried their burden of justifying
28 this discrimination, § 900 violates the Commerce Clause. See Camps
Newfound/Owatonna, Inc. v. Town of Harrison, Me. 520 U.S. 564, 581
(1997) (holding a statute which discriminated against interstate
commerce was "all but *per se* invalid" and violated the Commerce

1 Clause). Therefore, Defendants are permanently enjoined from
2 enforcing § 900 on interstate raw milk sales.⁴

3 The Clerk's Office shall enter judgment in accordance with
4 this Order. Lastly, Plaintiffs' request for leave to file their
5 respective motions for attorneys' fees within forty days of the date
6 on which this Order is filed is granted.

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8 Dated: May 7, 2004

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GARLAND E. BURRELL, JR.
United States District Judge
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⁴ Since this injunction remedies the harm to Plaintiffs at
21 issue in this litigation, no injunctive relief regarding other
22 sections of the Pooling Plan is warranted. See Armstrong v. Davis,
23 275 F.3d 849, 872 (9th Cir. 2001) ("In determining the scope of
24 injunctive relief that interferes with the affairs of a state
25 agency, we must ensure, out of federalism concerns, that the
26 injunction heels close to the identified violation and is not
27 overly intrusive. . . .") (citation and quotation marks omitted).
28 Nor is Plaintiffs' request for a declaratory judgment granted. A
federal court need not issue declaratory relief "[w]here a party
[has obtained] . . . a substantially similar alternative remedy
such as an injunction." Kinghorn v. Citibank, N.A., 1999 WL 30534,
at *7 (N.D. Cal. Jan. 20, 1999); see also Allis-Chalmers Corp. v.
Arnold, 619 F.2d 44, 46 (9th Cir. 1980) (finding judge may refuse
declaratory relief "[w]here more effective relief can be obtained
by other proceedings").